U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 October 2003

Case No: 2001-BLA-538

In the Matter of

DENNIS R. VARNEY

Claimant

v.

CHEYENNE EAGLE MINING COMPANY, INC.

Employer

OLD REPUBLIC INSURANCE COMPANY, INC.

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Susie Davis, Lay Representative
KENTUCKY BLACK LUNG ASSOCIATION
Pikeville, Kentucky
For the Claimant

Laura Metcoff Klaus
GREENBERG TRAURIG, LLP
Washington, D.C.
For the Employer

BEFORE: Rudolf L. Jansen
Administrative Law Judge

DECISION AND ORDER ON REMAND – AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title.

Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201 (1996).

Claimant filed his application for benefits on March 18, 1997. The claim was denied by Administrative Law Judge Robert L. Hillyard on December 28, 1998 after Judge Hillyard found the existence of pneumoconiosis but no total disability due to the disease. The Benefits Review Board affirmed that Decision and Order on December 16, 1999. Claimant requested modification of the denial on December 5, 2000 and the District Director granted the request on January 12, 2001, finding that Claimant had presented evidence establishing total disability. The Employer requested a formal hearing, which was held on October 16, 2001 before the undersigned. In my Decision and Order Denying Modification, I found a change in the miner's condition in that Claimant had now established total disability, but denied benefits on the basis that Claimant had not shown that his disability was due to pneumoconiosis.

In a second appeal, the Benefits Review Board affirmed my finding that the evidence was not sufficient to establish the existence of complicated pneumoconiosis, which may have entitled Claimant to the irrebutable presumption provided under Section 411 of the Act, as implemented by 20 C.F.R. § 718.304. Further, the Board intentionally did not address whether I had properly considered all x-ray evidence in arriving at my conclusion that a preponderance of the evidence established the existence of pneumoconiosis, as I had found the existence of the disease by the medical opinion evidence, as well, pursuant to 20 C.F.R. § 718.204(a)(4). The Board then recognized that I had properly considered the medical opinions of Drs. Fino, Repsher, Rosenberg and Sundaram in my analysis of the evidence surrounding the issue of disability causation. However, the Board determined that I had failed to address and consider the opinions by Drs. Westerfield, Myers, Mettu, Fritzhand, Wright, Broudy and

Branscomb in finding no disability due to pneumoconiosis. Thus, the Board remanded the case for further consideration of these medical opinions. The Board noted that the failure of some of these physicians to find the existence of pneumoconiosis, contrary to the weight of the evidence of record, could affect the credibility and probative weight that should be assigned to their opinions. The Board further noted that I could consider the credentials of each physician, the equivocal nature of each opinion, and whether an opinion was based on a "complete picture of the miner's health, including smoking history," in assessing the medical opinion evidence.

The Findings of Fact and Conclusions of Law that are contained in my prior Decision and Order are adopted in this decision except to the extent that they were found to be erroneous by the Board or to the extent that they are inconsistent with the findings and conclusions expressed herein. Claimant and the Employer have filed briefs on remand, which have been received into the record and considered.

ISSUES

The sole issue remaining for resolution on remand is whether Claimant can now show that he is totally disabled due to pneumoconiosis. Because Claimant last worked as a coal miner in Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Smoking History

The record reveals a varied and conflicting smoking history. The smoking histories range from lifelong non-smoker to smoking one-half package of cigarettes a day for twelve years. The record is consistent in showing that Claimant quit smoking in 1977 and that when Claimant was smoking he smoked one-half package of cigarettes a day. In my previous Decision and Order of April 24, 2002, I found that Claimant smoked one half package of cigarettes from 1965 until 1977. In his December 28, 1998 Decision and Order, Judge Hillyard made a finding of a smoking history of one half package of cigarettes a day for six years. At the 1998 formal hearing, Claimant testified regarding smoking that, "I tried a few when I started in high school and then I smoked a little bit in the military." (DX 62). In addition, he stated that when smoking "a pack would last two days sometimes three." Claimant was deposed on May 16, 1995 and testified that he quit smoking in 1977 and that

he smoked approximately five to six years. (DX 49). Again he stated that "a pack would last [him] two or three days."

Claimant would have been twenty-eight years old in 1977 when he quit smoking. Claimant testified and reported to several physicians that he began smoking in high school. Therefore, a smoking history of ten to twelve years is consistent with Claimant's testimony and accounts made to physicians. I conclude that the evidence of record supports a finding that Claimant smoked one-half package of cigarettes per day for twelve years.

Narrative Medical Evidence[1]

In my previous Decision, I thoroughly discussed and weighed all reports and opinions of record by Drs. Fino, Rosenberg, Repsher, Caffrey and Sundaram. The Board did not disturb my evaluation of these opinions and, thus, I incorporate my analyses of these medical reports herein.

Ramanarao V. Mettu, M.D., examined Claimant on October 13, 1993. (DX 15, 16). Based on his examination, pulmonary function study, arterial blood gas study, x-ray, EKG, symptoms, and Claimant's work history, Dr. Mettu diagnosed arthritis and status post-neck injury. He reported that Claimant was a lifelong non-smoker. His report stated that the x-ray revealed simple pneumoconiosis; however, one of his report forms stated that the chest x-ray did not reveal any evidence of pneumoconiosis. (DX 15). His evaluation concluded that Mr. Varney had severe obstructive airway disease with "decreased MVV." Dr. Mettu did not opine whether the disease prevented Claimant from engaging in coal mine employment. Dr. Rettu is board-certified in Internal Medicine and Pulmonary Medicine.

Ballard D. Wright, M.D., examined Claimant on October 23, 1993 and issued an examination report on that date. (DX 49). He performed a chest x-ray, a pulmonary function study and an arterial blood gas study. He considered an accurate work

[1] Because the Board affirmed my findings surrounding the x-ray evidence, the pulmonary function study evidence and the blood gas study evidence, this data will not be summarized in this Decision and Order. However, the summaries of this evidence contained in my last Decision, issued April 24, 2002, pages 4-5, are hereby incorporated by reference and will be considered and weighed along with the medical opinion evidence as necessary to resolve the remaining issue.

history and that Claimant never smoked cigarettes. Although Dr. Wright recorded that Claimant never smoked, he diagnosed Claimant with Chronic Smoker's Bronchitis. He opined that Claimant had the respiratory capacity to engage in coal mine employment. Dr. Wright is board-certified in Anesthesiology.

Byron T. Westerfield, M.D., examined Claimant on April 4, 1995 and issued an examination report on that date. (DX 18). Based on symptoms, a 23-year coal mining history, a history of smoking 4 to 5 years, medical history, pulmonary function study and x-ray, this physician diagnosed pneumoconiosis, which he believed contributed to Claimant's inability to perform his usual coal mine work. Dr. Westerfield was deposed in 1996, at which time he stated that he believed the 1995 pulmonary function study was valid and that "at least some" of the miner's impairment was due to coal workers' pneumoconiosis. (DX 22). He could not say "exactly how much" of the impairment was due to pneumoconiosis and could not "explain" the rest of the miner's impairment, but believed that pneumoconiosis was "at least not an insignificant portion" of Claimant's disability. In December 1997, Dr. Westerfield completed a consulting report based on his review of all other reports submitted to that date. (DX 52). After this review, he continued to believe that Mr. Varney had pneumoconiosis, that he had a respiratory impairment preventing him from performing arduous work or heavy work associated with his former coal mine employment, and that "at least a significant part" of Claimant's respiratory impairment was due to the inhalation of coal dust during his employment as a coal miner. Dr. Westerfield is board-certified in Internal Medicine and Pulmonary Medicine.

John E. Myers, M.D., examined Claimant on March 7, 1995 and issued an examination report on that date. (DX 17, 21). He provided a full pulmonary workup, including a chest x-ray, a pulmonary function study, an arterial blood gas study and an EKG. He considered an accurate work history and that Claimant smoked cigarettes for approximately 2 ½ years. Based on examination findings, Claimant's symptoms and the results of the objective data achieved from the testing, Dr. Myers diagnosed Claimant with pneumoconiosis, chronic obstructive pulmonary disease (COPD) with probable bronchiectasis involving the left lower lung, "probably post unrecognized pneumonia." Dr. Myers believed that as a result of both respiratory condition, Claimant was "limited" from arduous manual labor, although he could perform light manual labor. He added that the miner "could do his usual coal miner work," but would be "limited." Dr. Myers is board-certified in Internal Medicine.

Bruce C. Broudy, M.D., examined Claimant on May 19, 1995 and on June 18, 1997. (DX 48). He considered an accurate work history in both medical reports. For the 1995 examination, Dr. Broudy reported that Claimant began smoking in high school and continued to smoke one-half package of cigarettes per day until 1977, making for a 12-year smoking history. For the 1997 examination, Dr. Broudy reported that Claimant smoked one-half package of cigarettes per day for 6 years, quitting in 1977. After his 1995 examination, he diagnosed back pain and chronic bronchitis, but did not believe Claimant had pneumoconiosis. Dr. Broudy believed Mr. Varney retained the respiratory capacity to perform the work of an underground miner or similarly arduous manual labor. Further, he did not believe there was any significant pulmonary disease or respiratory impairment that had arisen from his occupation as a coal miner. After Dr. Broudy's 1997 examination, he diagnosed back pain, chronic bronchitis and an "abnormal chest x-ray," but did not find any profusion sufficient to diagnose pneumoconiosis. Dr. Broudy still maintained that Mr. Varney had no respiratory disease that had arisen from his past coal mining and found only "mild" resting arterial hypoxemia from his blood gas study results. He based his determinations on his examinations, along with pulmonary function studies, blood gas studies, symptoms, and medical history. Dr. Broudy is board-certified in Internal Medicine and Pulmonary Medicine.

In April of 1997, Dr. Martin Fritzhand examined the miner and conducted a pulmonary function study and blood gas study at that time. (DX 24) Based on this data, along with the miner's occupational history and a history of smoking one-half package of cigarettes per day for approximately eight years, Dr. Fritzhand diagnosed pneumoconiosis and a "mild to moderate impairment" from that disease. Dr. Fritzhand also believed that Mr. Varney no longer had the respiratory capacity to perform the work of a coal miner. Dr. Fritzhand also recorded the patient's statement that "he is unable to maintain CME [coal mine employment] due to low back pain." Dr. Fritzhand's qualifications are not of record.

Ben V. Branscomb, M.D., issued a consultative medical report on November 6, 1997. (DX 51). He considered an accurate work history and noted the various smoking histories reported in the record. He also stated that the carboxyhemoglobin results from a 1997 arterial blood gas study demonstrated that he was not smoking at that time. Dr. Branscomb found no evidence of pneumoconiosis or other occupational pulmonary disease. In

addition, he opined that Claimant possessed the respiratory capacity to perform his former coal mine employment. Dr. Branscomb is board-certified in Internal Medicine.

DISCUSSION AND APPLICABLE LAW

As explained, above, the miner has shown that he is totally disabled from performing his usual coal mine work or comparable work from a respiratory standpoint, but must also prove that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. § 718.204(c)(1). The disease is considered a "substantially contributing cause" of the disability if it has a material adverse effect on the miner's respiratory condition or materially worsens a totally disabling respiratory impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1). Proof that a miner suffers from a totally disabling respiratory impairment is not, by itself, sufficient to establish that a miner's impairment is due to pneumoconiosis under the regulations. § 718.204(c)(2). Under this subsection, the causes of the miner's disability must be established by means of a physician's documented and reasoned medical report.

In its interpretation of this regulation, the Sixth Circuit has found that a claimant's non-coal dust related respiratory disease, even if totally disabling in and of itself, does not preclude entitlement to benefits as long as a claimant can show that pneumoconiosis "materially worsened" the pulmonary condition. *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001).

Nevertheless, it is the Claimant's burden, pursuant to § 718.204, to establish total disability due to pneumoconiosis and there is no presumption in this case that Claimant's disability was caused by the disease. *Baumbartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986). Thus, even if the medical opinions establish a total respiratory disability, as they have in this case, the regulations still require Claimant to show that pneumoconiosis was a *substantially contributing cause* of that impairment. 20 C.F.R. § 718.204(c)(1).

Dr. Broudy also determined that Claimant was capable of returning to coal mine employment. He did not diagnose pneumoconiosis or find that Claimant was disabled from a respiratory standpoint, contrary to the weight of the evidence. A medical opinion is less persuasive on the disability causation

issue when a doctor does not diagnose pneumoconiosis contrary to the determination by an Administrative Law Judge that the disease exists. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 265 (4th Cir. 2002). Dr. Broudy did not diagnose pneumoconiosis. In addition, he determined that Claimant retained the respiratory capacity for coal mine employment; thus, he did not address the etiology of Claimant's respiratory impairment. For these reasons, I assign his opinion less weight.

Dr. Wright opined that Claimant retained the respiratory capacity to engage in coal mine employment. Dr. Wright blamed the patient's symptoms on smoking, even though he stated in his report that Claimant was a lifelong non-smoker. I find Dr. Wright's opinion to be inconsistent as he does not explain his diagnosis in reference to his account of Claimant as a non-smoker. I find his opinion to be poorly reasoned regarding the etiology of Claimant's respiratory condition. In addition, Dr. Wright did not diagnose pneumoconiosis, contrary to my finding. For these reasons, I assign his opinion less weight.

Dr. Branscomb's consulting report was in line with Dr. Broudy's opinion that Claimant did not suffer from an occupational lung disease that would prevent him from carrying on his previous coal mine work. Because this physician did not believe a disability existed, he did not comment on the cause of any possible impairment that would prevent Mr. Varney from performing his last coal mine duties. Therefore, his opinion is not probative on the issue of total disability causation.

Dr. Myers was somewhat vague in his diagnosis of a disability, in that he first reported Mr. Varney was "limited" from arduous manual labor, but added that Claimant could still perform his usual coal mine work on a "limited" basis. This doctor, an internist, believed that this "limited" condition was due, at least in part, to pneumoconiosis. I must assign less probative weight to this physician's opinion because of its equivocal nature surrounding the issues of disability and disability causation. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995).

Dr. Fritzhand attributed the miner's disabling impairment to pneumoconiosis. He supplied at least a brief rationale for his conclusion, based on his examination, the miner's occupational history and objective test results, specifically reporting "[p]neumoconiosis--based on long H/O [history] coal

dust exposure with abnormal PFS and BGS in light of + CXR [chest x-ray]." Thus, I find Dr. Fritzhand's report weighs in favor of finding total disability due to pneumoconiosis and is entitled to full weight. *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 108 (1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Dr. Westerfield, who is board-certified in pulmonary disease, compiled a well-documented and reasoned opinion that reported a total disability due at least in part to pneumoconiosis. This doctor could not specify how much of Mr. Varney's impairment was due to other conditions, such as his bronchitis and lower back pain, but believed that pneumoconiosis was "at least a significant part" of the disability he observed. I assign great probative weight to Dr. Westerfield's opinion on this issue because he provided a thorough explanation of the basis for conclusions and because of his credentials. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Burns v. Director, OWCP*, 14 BLR 1-2 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Dr. Mettu, an internist, provided no opinion on the cause of Claimant's "severe obstructive airway disease," so his report is of no probative value on this issue.

In my first Decision, I found that Dr. Gregory J. Fino's opinion was probative but not particularly helpful on the causation issue, as this pulmonary specialist could not pinpoint the etiology of the impairment, referring to it as "whatever is going on in his chest." (EX 10 at 8). He determined that Claimant did not suffer from pneumoconiosis, but stated that he has a "significant infiltrative disease." (EX 8). He based his opinion on a comparison of chest x-rays taken in 1995 compared to the x-ray taken at his 2001 examination. He explained that the disease present in the 2001 x-ray progressed too rapidly to be pneumoconiosis. In order to diagnose this condition, Dr. Fino stated that a biopsy would need to be performed. Dr. Fino opined that this as yet undiagnosed disease is the cause of Claimant's total disability. As Dr. Fino did not diagnose pneumoconiosis, contrary to my finding, his opinion is entitled to less weight on this issue. See *Tussey*, 982 F.2d 1036; *Scott*, 289 F.3d at 265.

Dr. Lawrence H. Repsher opined that Claimant has no respiratory impairment arising out of coal mine employment. He testified on deposition that Mr. Varney "probably does have some impairment, but I would attribute that solely to his cigarette smoking habit." (EX 7). Dr. Repsher considered an inaccurate smoking history, reporting that Claimant quit smoking in 1997 rather than 1977, as the record establishes. As his opinion is vague on whether Claimant has a respiratory disability and his reliance on an inaccurate smoking history, I assign his opinion less probative weight.

Dr. Raghu R. Sundaram opined that Claimant is totally disabled due to a respiratory impairment. He opined that pneumoconiosis is the cause of the impairment. However, Dr. Sundaram's report does not contain an accounting of Mr. Varney's smoking history. As it is unclear whether Dr. Sundaram had an accurate view of Claimant's smoking history, his diagnosis may not have been based on a complete picture of Claimant's health. Therefore, his opinion is entitled to less weight.

Dr. David M. Rosenberg's credentials are not of record, but he did not believe Mr. Varney was totally disabled, so did not offer a cause for respiratory disability. The last opinion, by pathologist P. Raphael Caffrey, did not rule out pneumoconiosis based on slides of a biopsy, but did not include any opinion on disability.[2] As these physicians did not find Claimant to be totally disabled, their opinions have no probative value on this issue.

A review of all the above medical opinions leads me to rely on the well-reasoned and documented opinion of Dr. Westerfield, whose opinion also deserves great probative weight because of his expertise in the area of pulmonary medicine. His opinion is supported by that of Dr. Fritzhand. Although his two reports and Dr. Fritzhand's report are not as recent as those of Drs. Fino, Rosenberg, Repsher and Sundaram, the more recent reports are not as reliable on the causation issue and do not detract

[2] I note that the Board affirmed a previous analysis, by Judge Hillyard, of the weight to be afforded the initial opinions by Drs. Fino, Mettu, Broudy, Fritzhand, Myers, Branscomb, Westerfield and Wright based on the reliability of the objective tests underlying each of their reports. (Benefits Review Board Decision issued December 16, 1999, pp. 4-5). However, I must reweigh these opinions, as the causation issue now before me is different than the issue then before Judge Hillyard, i.e., whether Claimant was totally disabled. Therefore, the bases for Judge Hillyard's acceptance or rejection of an opinion may or may not apply to my analysis.

from Dr. Westerfield's opinion. These opinions contain inaccuracies in their diagnosis of pneumoconiosis, or they failed to consider the miner's smoking history, or were equivocal on the issue of what is contributing to the miner's respiratory impairment. As a result, I find the opinions of Drs. Westerfield and Fritzhand meet Claimant's burden of showing that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment.

CONCLUSION

In sum, the medical evidence establishes the existence of pneumoconiosis, and that the miner was totally disabled due to that disease, as defined under the current regulations. Accordingly, the miner is entitled to benefits.

ENTITLEMENT

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month during which the claim was filed. 20 C.F.R. § 725.503(b). I cannot determine from the record when Mr. Varney became totally disabled. Consequently, Claimant shall receive benefits commencing March 1, 1997, the month this claim was filed.

ORDER

Cheyenne Eagle Mining Company, Inc. is ORDERED to pay the following:

1. To Dennis R. Varney all benefits to which he is entitled under the Act, augmented by reason of his one dependent, commencing March 1, 1997.

2. To the Secretary of Labor, reimbursement for any payments that the Secretary has made to Claimant under the Act. The Employer may deduct such amounts, as appropriate, from the amount that it is ordered to pay under paragraphs 1 and 2 above. 20 C.F.R. § 725.602.

3. To Claimant or the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty days from the date of the initial determination of entitlement to benefits. 20 C.F.R. § 725.608.

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RUDOLF. L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.